EXHIBIT 6
(Pt. 2)

Exhibit 6

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * * * *
BRUNO HOFFMANN, et al *
Plaintiffs, *
*
vs. * CIVIL ACTION
* No. 04-10027-JLT
PHILIP LAUGHLIN, et al *
Defendants. *
* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
MOTION HEARING

A P P E A R A N C E S

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February 5, 2007
11:05 a.m.

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I N D E X

No. 1	Document	61
No. 2	Color Chart with citations submitted by Mr. Shapiro	61

P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court.

THE COURT: Good morning everybody.

THE CLERK: This is civil action No. 04-10027, In Re: Organogenesis Securities Litigation.

Counsel please identify themselves for the record.

MS. GANS: Nancy Freeman Gans, Moulton & Gans,

for the plaintiffs.

MR. SLOANE: Peter Sloane of Milberg Weiss for the plaintiffs.

THE COURT: Okay.

MR. WALLNER: Good morning. Robert Wallner, Milberg Weiss, for the plaintiffs.

MS. SHANAHAN: Good morning, Your Honor. I am Sara Shanahan from Griesinger, Tighe & Maffei for defendant John Arcari.

THE COURT: Okay.

MR. SHAPIRO: Good morning, Judge. Jonathan Shapiro and with me is Jeffrey Rudman from Wilmer Hale for the following defendants: Donna Lopolito, Philip Laughlin, Albert Erani, Michael Sabolinski and Alan Tuck.

THE COURT: Okay.

MR. SAPAROFF: Good morning, Your Honor. Peter Saparoff from Mintz Levin for Herbert Stein, defendant.

THE COURT: Okay.

MR. LEONE-QUICK: Good morning. Breton Leone-Quick, also from Mintz Levin for defendant Herbert Stein.

THE COURT: All right. It is nice to have all of you here.

I have read I think just about everything and I think I have some grasp of the underlying issues.

I guess a place to start is the Milberg Weiss situation. It sort of permeates everything here.

The argument is made that there is a probable cause situation that invites further scrutiny or scrutiny beyond what you would normally have in a case like this. And then on the other side we have a presumption of innocence and the process, the process that is involved in these cases anyway where the truth comes out.

And so I guess what I want to hear from the defendants is where we are on that. And maybe you disagree with me. It seems to me that it runs through everything.

MR. SHAPIRO: Yes, Your Honor. In fact, there are essentially two themes that bear on the Milberg Weiss situation.

One certainly is the indictment itself and what that means and what it doesn't mean. And then there is also simply the performance in this case to the extent you can

actually extract it or disaggregate it.

THE COURT: Well, the performance, as I read it, there are a lot of things to say. I am not saying nitpicky things but there are a lot of things to say which we wouldn't be spending, you know, if that is all it was, we wouldn't be spending twenty minutes on it if it weren't for the indictment.

Do you -- at least that is my experience over the last 35 years.

MR. SHAPIRO: As a general matter, yes, Your Honor. And there is a certain aggregate effect here.

If I may propose, simply just to not to try your and everyone else's patience and to motor along, what we

have done is we have come up with just a time line of some of these issues so you can place them in time. That way we don't have to talk about all of them unless Your Honor is interested.

THE COURT: Go ahead. But, I mean, you are the one that is interested ideally in knocking Milberg Weiss out and knocking out some of these people that --

MR. SHAPIRO: Certainly. That is absolutely correct.

THE COURT: So why don't you go for the knockout and see if you make it.

MR. SHAPIRO: Okay. Well, in terms of

knocking them out, the way we would look at is they have the burden of proof in the first instance to demonstrate the adequacy not just of the law firm, of course, but the plaintiffs and every one of the other elements that's required under 23(a) and 23(b)(3) and also 23(g).

If I could just approach, I'll pass out this time line. I have a bunch of them.

THE COURT: Give one to Steve.

MR. SHAPIRO: Sure. Hopefully they're all the same.

(Pause in proceedings.)

MR. SHAPIRO: These are all events, Your Honor, that are in the record. And we can give you the cites for all of them but --

THE COURT: If you want to use this (indicating) podium --

MR. SHAPIRO: That actually would be great.

THE COURT: Just bring it back to where you are and do whatever you want to do with it.

MR. SHAPIRO: Now, in terms of the indictment, there is one thing that we want to be very, very clear about from the get-go.

Defendants are a defendant in a securities case. This is a securities case as well. You know, we have no issue whatsoever with the presumption of innocence.

It is important and it attaches to new counsel and it attaches to the partners at the Milberg Weiss firm or the former partners who have been indicted. So we are not suggesting in any way, shape or form that the simple fact that this law firm has been indicted, that a grand jury found probable cause is a reason to deny the motion.

But on the other hand, it --

THE COURT: Is a reason to deny the motion?

MR. SHAPIRO: For certification.

THE COURT: For certification.

MR. SHAPIRO: Right. It's a bit more complex than that.

And I think that fairly read the plaintiffs have taken the position that, well, until we're tried -- and I guess the trial is later this year or January next year -- it's irrelevant.

Well, it's not irrelevant because the presumption of innocence attaches to the law firm. But here the plaintiffs are the movant and the question is is this law

firm fit to serve in a fiduciary role. Does it matter to Your Honor under Rule 24, under the precedent, whether the indictment and all the other things that have gone wrong in this case, does that matter in determining whether they are fit to serve in this case as sole lead counsel?

We say it matters and I will give you a couple of examples.

One, when Milberg Weiss came forward back in '04, and, again, when they filed their motion for class certification in '06, this was back in May of '06, they said one of the reasons they were qualified is because they're the best law firm in the business in this area. And then they told you that they have a lot of very noteworthy clients.

Two of those noteworthy clients were very large pension plans, pension funds. One for the state of New York, one for the state of Ohio.

Well, after the indictment the Attorney General of Ohio said you're not our lawyer anymore. And the comptroller of New York said you're not our lawyer anymore.

The way --

THE COURT: I think I misheard you. I thought you said you are not a lawyer.

MR. SHAPIRO: You are not our lawyer anymore.

THE COURT: Okay.

MR. SHAPIRO: No, they certainly are a lawyer.

THE COURT: I mean, there has been no disbarment or anything?

MR. SHAPIRO: Not that I'm aware of. The only thing I've heard is that there is some inquiry in Delaware. And beyond that I can't speak to that.

THE COURT: Okay. Go ahead.

MR. SHAPIRO: But the reason that these top officials, the AG and the comptroller, discharged the law firm was not because they had assumed that the grand jury was right but because when it comes to selecting a fiduciary to represent those public pension plans, and in this case to represent the sole lead counsel, a class of absent investors, the fact that a law firm has been indicted for lying to courts does matter. It doesn't mean they did it but it matters.

And I think that's the reason why a number of courts have grappled with this very issue that Your Honor posed. We have the presumption of innocence that attaches to them but does that, is that the answer to the adequacy question.

Judge Hornby, District of Maine, very late in December addressed that issue head on in the In Re: Motor Vehicles case. That was not unlike this case at the class certification stage. There the judge on sort of an interim basis saw this issue, looked at it, respected the presumption of innocence, but said this firm under these circumstances is not fit to continue as a fiduciary.

This case is actually different because there Milberg Weiss wasn't alone. There was co-counsel. The same in the Medtronics case. That's in Minnesota. There a

11

federal district judge came to the conclusion that under the circumstances Milberg Weiss could not continue as one of a handful of firms working jointly on a steering committee.

Here, again, they're alone.

The Chancery Court days before the indictment was unsealed -- it was all, of course, all in the papers. The Chancery Court said reading just what I'm reading in the paper I wouldn't be comfortable appointing them sole lead counsel. And there have been other courts as well.

Now, Milberg Weiss and the plaintiffs in this case have provided Your Honor with a list, a fairly long list of other courts that plaintiffs say stand for the proposition that they are as fit and ready to go today as they were a year ago.

If you look at each of those decisions, not one of them as we read them -- and they haven't identified any -- appointed Milberg Weiss as sole class counsel on a contested motion. In a number of them there were stipulations. It wasn't litigated. I think in virtually all of them they had co-counsel. And, in fact, in a number of those cases, including one that plaintiffs brought to Your Honor's attention, I don't know, sometime last week, Milberg Weiss affirmatively said, Judge, don't worry, we have co-counsel who is not indicted and that provides a safety net.

So there is no safety net here. They're alone.

12

Now, just taking it one step further, I think that the inadequacy of counsel and the inadequacy of their clients, of the lead plaintiffs, is laid bare by how they reacted to the indictment.

They sent Your Honor a letter. They said, Judge, none of the attorneys litigating the case have been accused of misconduct.

Well, the law firm that's been litigating the case is indicted. The lead Milberg Weiss partner who showed up on fourteen odd pleadings in court papers on this docket in this case has been indicted. He also signed the engagement letters.

And, in fact, just a couple of weeks ago the Eastern District of Michigan in the Florida ERISA case looked at the same boilerplate no lawyer litigating this case accused of misconduct and said that it raises questions about candor and for that reason and others, declined to appoint Milberg Weiss lead counsel.

Now, turning to the plaintiffs, I have already told Your Honor that sophisticated pension plans, the ones that Milberg Weiss holds out as their blue chip clients, let them go. Here these plaintiffs made a decision or did not make a decision to keep the lawyers. And that at least raises a question as to what --

THE COURT: When you say "these plaintiffs,"

help me. Who are we talking about?

MR. SHAPIRO: Sure. There were four lead plaintiffs.

THE COURT: You are talking about in this case?

MR. SHAPIRO: Absolutely in this case.

THE COURT: You are not talking about the other case?

MR. SHAPIRO: No, I'm talking about in this case.

THE COURT: All right.

MR. SHAPIRO: The question is serious enough that we would suggest that any adequate lead plaintiff, anybody who wants to serve as a fiduciary demands a very high standard of care and diligence and focus -- there are lots of cases for that -- would have at least looked hard at this issue before deciding to keep Milberg Weiss as the sole lead counsel. He says they haven't done anything in that regard.

At his deposition Mr. Madigan, one of the two remaining lead plaintiffs, heard something about -- heard something about an indictment but testified that he did not know that the law firm was indicted. He did not know that Steve Schulman who signed his engagement letter had been indicted. He had never seen the indictment because lead

plaintiff -- lead counsel never showed it to him. So the first time he saw the indictment was at his deposition.

Similar story for Mr. Hoffman. Doesn't know much about the indictment. Trusts the lawyers. He's satisfied, you know, someone else will make a judgment in the long run. Maybe that's a rational decision or maybe it's not. But

here there has been no effort whatsoever to go through what one would expect to be a deliberative process.

So you look at the indictment. You look at the five cases or so that we have put in front of you in which this law firm has been found ill fit to serve even with co-counsel. You consider the fact that they don't have any court that has found them on a litigated motion to be fit to serve as sole lead counsel.

And then you overlay that into what has been a rather extraordinary set of issues that have come up over the last several months since Your Honor ordered the production of documents.

And I think if you look at that series of issues, even if this wasn't an indicted law firm with all those problems, they wouldn't be adequate even looking at it sort of on a standalone basis, not the plaintiffs and not the lawyers.

There have been multiple false affidavits filed in this case. I'm not suggesting it was intentionally false.

Maybe it was inexcusably negligent. It doesn't matter. Fiduciaries are supposed to get these things right.

We have lost two lead plaintiffs.

Four plaintiffs and the law firm put in front of Your Honor affidavits in 2004 when they asked you to appoint them to be lead plaintiffs. Your Honor appointed them. Your Honor had no reason to doubt the truthfulness of those affidavits, the ones filed in '04. They were signed under oath. Rule 11, PSLRA and so forth. You appointed them to

those fiduciary roles.

Then they filed papers last May. They said they now want to also serve a fiduciary role as class representative and class counsel. If you look at the papers that were filed in May, May of '06, they told Your Honor that this is an ideal class action. Obvious slam dunk.

They specifically represented that there can be no doubt that the four lead plaintiffs and Milberg Weiss are up to the task.

Then Your Honor set a discovery deadline. You said all of you have to produce your stuff and you've got to do it by June 30th. And no messing around and I am not going to give you an extension.

On June 29th, the day before Your Honor's deadline, another letter was sent to the court. This letter June 29th said there may be some problems. And that was a real

understatement.

Almost immediately after that letter two of the four supposedly ideal lead plaintiffs don't show. The first to go was Dr. Conen, Richard Conen. He resigned because he said he had to under the Supreme Court Dura case. Dura, of course, says that Dr. Conen can't sue the defendants unless he can show that the defendants caused him a loss. So that took care of Dr. Conen.

THE COURT: He had no loss.

MR. SHAPIRO: I don't know whether he had a loss or not. All I know is because we haven't been able to --

THE COURT: He said he had no loss; isn't that right?

MR. SLOANE: Excuse me, Your Honor?

THE COURT: He said he had no loss; isn't that right?

MR. SLOANE: No, he moved to withdraw -- excuse me, Your Honor.

He moved to withdraw because he, after considering the impact of Dura, we didn't feel he was an appropriate class representative.

MR. SHAPIRO: That is the same explanation we got. We can't depose him because they say he is no longer up for a deposition.

THE COURT: All right.

MR. SHAPIRO: So for whatever reason. They cite the Supreme Court case which says you have got to show a connection between damages and what you're suing about. And they cite that case and he is gone.

And we are happy to let him go because it is necessary, we don't want to waste time and money and everything.

The second to go was Richard -- excuse me -- was John Bowie. John Bowie is a stock broker who filed a very false affidavit about his trading in stock.

Back in '04 when he wanted to be lead plaintiff, he told Your Honor that he had four transactions during the class period, precisely four. He somehow forgot to mention 83 more.

So after Your Honor sets the discovery deadline, they come clean and say we've got these problems. Mr. Bowie puts in another affidavit in which he says I am deeply sorry, I apologize and I'm embarrassed. He puts that affidavit in in July and promises to correct his affidavit.

He never corrects his affidavit. Six days later guess what? He's gone too. Personal reasons.

The reason all these affidavits are false -- and we still haven't gotten to the most false -- the reason they're all false is because we also learned on June 29th that

Milberg Weiss never corrected the trading documents. They never corrected the trading documents before they put in four plaintiffs' affidavits and one attorney affidavit and like a dozen plus pleadings and court papers all based on trading. They never collected the documents.

The case was filed in January '04. And they came clean with not having the documents in June of '06. That's not how fiduciaries behave, Your Honor. And that was just the beginning.

So we went from the four ideal plaintiffs very quickly within weeks down to two. The two that remain are Richard Madigan and Bruno Hoffman. We have briefed this extensively. It's in this fancy little chart we pulled together so I won't go through it all. But they're no better than the two that are left.

Starting briefly, Your Honor, with Richard Madigan. You appointed him at the same time as you appointed Mr. Bowie lead plaintiff. Mr. Madigan told you about nine

trades, all in which he said he lost money, losing trades.

In truth there were 55 more that didn't make it onto the page. So Mr. Bowie's affidavit was 95 percent wrong and Mr. Madigan's was 85 percent wrong. And things got worse.

Mr. Madigan, like Mr. Bowie, put in another affidavit apologizing, deeply embarrassed. He says he

doesn't have any memory of how it happened. It's all very vague. But no worries, Your Honor, I'm going to fix it. And he tells Your Honor he is working to collect the documents and he will file a new affidavit.

Well, he didn't file a new affidavit all that fast. The promise came in July, you know. It took him until after Labor Day for you to get Madigan affidavit No. two.

Madigan affidavit No. two shows up conveniently some forty hours before his deposition. So it's late. And guess what? Madigan affidavit No. two is also false.

At his deposition Mr. Madigan realized immediately that affidavit No. two was false. It included his son's trades and his daughter-in-law's trades.

So when asked how affidavit No. two becomes false, the testimony was, well, I didn't check the trading records before I signed affidavit No. two.

All right. Well, who prepared affidavit No. two for you, Mr. Madigan? I don't know. I think it was an analyst but I don't know his or her name. But it was someone working with Milberg Weiss.

So affidavit No. one is false. Affidavit No. two,

unread, unchecked, signed, that's false. Less false but still false.

What else did we learn at the deposition? Mr. Madigan, have you ever seen this document, the

complaint, the operative complaint? I don't think I ever have. Have you ever read the complaint, sir, the operative complaint? My best guess is I haven't. Mr. Madigan, how much money have you lost? He can't really ballpark it. He thinks it might be around ten thousand but really just doesn't know.

So he never read the complaint. He doesn't know how much money he is seeking to recover from the never read complaint. And he is one of the two remaining supposedly ideal plaintiffs.

Judge Tauro, one would think that after the second false affidavit that Mr. Madigan and his counsel Milberg Weiss would have moved very quickly to correct it. No.

Ten more weeks go by. It was not until Thanksgiving or the week before Thanksgiving 2006 that Mr. Madigan finally put on file a trading certification that the PSLRA required to have been on file before this all started back in January of '04.

There are other reasons why he is not fit. Those bear on technicalities. We've been through adequacy. It all bleeds together.

When Mr. Madigan finally got around to disclosing the 55 odd trades left out before, it turned out that they were sales. They were class period sales. Those class

period sales, when we had to hire an expert to help us

figure it all out because they didn't do the job, it turned out that he was net up. He made money. He lost some money on some sales, made more money on other sales, was net up, I don't know, $15,000.

Your Honor, in a case in which the plaintiff is suing defendants for harm because they supposedly manipulated the stock, if the plaintiff makes more from the supposedly inflated stock than he lost, he is not a plaintiff. He doesn't have standing. Standing comes first. That's Judge Saris' AWP case, the Enron case, Allen, Lewis, some Supreme Court cases.

He's better off. And none of this was disclosed until -- well, the problem was disclosed in June '06. The truthful affidavit or what seems to be the truthful affidavit took until Thanksgiving '06. We never filed a motion to dismiss based on a lack of standing because we never knew because we were trusting the affidavits presumably just like the Court was.

Plaintiffs' response to this is, well, it all goes to damages. We will deal with that later. It's just a measure of damages. It doesn't blow up the case.

Your Honor, we think that's legally wrong. The vast majority of cases, certainly since Dura but in the last four or five years, have all held that the, you know, LIFO -- that's the analysis our experts use -- that the LIFO

methodology is right.

We're not aware of any case after the Supreme Court Dura decision that's held that their FIFO is right. And in some sense, Your Honor, it doesn't matter for class certification because there is a bona fide substantive dispute. They've got some cases in the '30s in the tax court. We have got, you know, four or five cases and Dura, you know, more recently.

Even if one were to credit their cases as being smarter or still binding, you still have a very substantive dispute and now we have a battle of the experts. We have got dueling affidavits on file.

So whether you look at it as standing, you know, a plaintiff with standing can't represent himself much less a class he is on, or whether you view it as a unique defense, a real defense, he is certainly not typical and can't serve as a class representative.

And finally with Mr. Madigan, he is not typical because he didn't buy on the open market information in a typical way. Mr. Madigan testified at his deposition that he met two or three times with the top management of Organogenesis initially. He met them at the company's headquarters.

And he testified that having a chance to meet the top management gave him some comfort about his investment

decision. That makes him atypical of the open market

investor who reads Yahoo or Wall Street Journal but doesn't get comfort by spending time in the executive suite. He is not adequate. And he's not typical.

Turning to Mr. Hoffman. Mr. Hoffman is the only plaintiff that's before Your Honor who near as we know did not file a false affidavit. But the absence of false affidavits doesn't make him adequate and doesn't make him typical.

He is certainly not a typical investor who makes an investment decision in reliance on open market information. In fact, Mr. Hoffman never decided to invest in Organogenesis at all. He wound up a shareholder because he gave his money and full discretionary trading authority to a broker or investment advisor.

The investment advisor without even talking to Mr. Hoffman knew some folks at Organogenesis and spent Mr. Hoffman's money on Organogenesis stock.

Mr. Hoffman testified that he had never even heard of Organogenesis until he saw that strange name on a brokerage statement. And at some point thereafter he fired the broker.

He is also not typical because the class period is 28 months and he stopped buying stock after six of them. This is a purchaser class. The allegation, the complaint

that Your Honor sustained was sustained on the basis that investors purchased based on misleading statements. And plaintiff alleged 39 of the statements. He stopped buying after nine of the statements. So he doesn't have standing

to sue anybody for the truth or falsity of the back thirty, the statements made during the twenty odd months that he wasn't buying.

Co-counsel Ms. Shanahan for defendant Arcari now has a motion for summary judgment because one of the defendants, her client Arcari, didn't join the company until he stopped buying. So he doesn't even have standing to sue one of the defendants.

And he's also not adequate, Your Honor, because he didn't do his job, under Carematrix, under Critical Path, under the long string of cases that say that a class representative needs to exercise diligence and care as a fiduciary of the highest order.

He may have been honest on his affidavit but he has no idea why all his co-plaintiffs are dropping off and why there are all these false filings in the case.

An adequate plaintiff at some point says what's going wrong with this case on my watch.

At his deposition Mr. Hoffman wanted nothing of that. It's not me. I don't know. It the lawyers' job. Abdication, your problem. That's not consistent with Rule

23 or the case law.

Mr. Hoffman also testified that he never spoke to his co-lead plaintiffs for more than two years after this case was filed. The Carematrix decision says co-lead plaintiffs need to run the show. Sonus says the same thing. They need to run the show. They need to exercise control, be on top of things, not let the lawyers, you know, run

wild.

They never spoke until sometime in '06 before his deposition. And that was a ten-minute call.

Parenthetically Mr. Madigan didn't remember speaking to him ever. But a ten-minute call after all that's happened in this case two and a half years down the pike is not adequate.

And finally, Your Honor, looking at the false affidavits in the context not only of this case but of other cases, there is still a false attorney affidavit that's on file with this case. It's been on file since like March of '04. It says plaintiffs have losses of some number more than two hundred thousand.

It includes losses of, you know, two plaintiffs who have fled and it includes apparently losses of Mr. Madigan who certainly didn't lose as much as they said he did and we think he didn't lose anything. That's still on file.

And then you look at the Sonus decision. In Sonus

Judge Wolf said this should never happen again. And what happened in Sonus pales in comparison. That was one wrong affidavit. It omitted post class period sales.

Here between Mr. Bowie and Mr. Madigan they disclosed thirteen and left out 138. And Mr. Madigan filed another false one. And lead plaintiffs still -- excuse me -- counsel still has a false affidavit on file from '04.

The response to that was, "People are human." And also that is inevitable. It's happened before and it will happen again.

That is not care and that's not diligence. There is no way these affidavits could possibly have been right because a lawsuit based on investment losses was filed and affidavits claiming investment losses were signed under oath and filed without anyone checking the trading records so that's inadequate as well.

The law, we would say, Your Honor, the law is on our side for the defendants because it puts the burden on the plaintiffs' side of the V. They have to show every element under Rule 23. That's the Tardiff decision, First Circuit '04. Polymedica, you know, emphasizes the importance in '05 of, you know, needing to check every box.

Just last year the Second Circuit -- I'm not suggesting it's binding on you -- but the Second Circuit says it's not even enough to show every element but you

can't do, quote, some showing. It's got to be robust.

They bear the burden on every element. It needs to be rigorous because you're looking at a set of defendants who need to defend themselves, that's our job, but we're spending hundreds of thousands of dollars chasing records they never collected.

And it may be in a case where two plaintiffs are gone, a third may not have standing at all and one may only have standing for six out of 28 months. They need to affirmatively show every single element under Rule 23.

And they haven't shown typicality for either plaintiff. They haven't shown adequacy for either of the two remaining plaintiffs. And their sole lead counsel just

isn't adequate.

Thank you, Your Honor.

THE COURT: Now, what will you have me do? You are very eloquent. You have made a very good argument.

Now, what is the bottom line? What would you have me do? Dismiss the case? What do you have in mind?

MR. SHAPIRO: I believe sort of under the law in the cases that we've looked at the appropriate course is you have to deny the motion. They still have individual cases on file. They brought cases in their own name and on behalf of a putative class. But Your Honor I believe has to deny the motion for certification because they haven't shown

each element.

THE COURT: Then what happens to the case?

MR. SHAPIRO: Then we still have pending individual complaints.

Mr. Bowie who fled still has a lawsuit against my client. I mean, it's a different lawsuit. But then it would be -- presumably the parties would confer and see how are we going to go about dealing with these individual lawsuits.

THE COURT: Okay.

MR. SHAPIRO: One final note, Your Honor.

THE COURT: Yes.

MR. SHAPIRO: They don't have another new plaintiff. They said back in July that there are, quote, hundreds or perhaps thousands of plaintiffs who could be adequate here but they have never come forward with any of

them. That's docket No. 143 on page 14.

They filed a motion. They haven't proved it up. Half of it is gone already. It needs to be denied.

THE COURT: Did you want to be heard now or do you want to wait? Or do you want to be heard at all?

MS. SHANAHAN: I can be very brief, Your Honor, or we can move on to plaintiffs.

THE COURT: Well, I want to give plaintiffs a chance to respond to everything, so go ahead.

MS. SHANAHAN: Okay. Well, just -- I'll defer to the plaintiffs now and go at the end, if that's better for the Court.

THE COURT: All right.

MR. SHAPIRO: Thank you, Judge Tauro.

THE COURT: Thank you.

MR. WALLNER: Thank you, Your Honor. May I address the Court here or would you rather me go --

THE COURT: Any place that you feel comfortable.

MR. WALLNER: Thank you, Your Honor.

May it please the Court, my name is Robert Wallner and I'm representing the plaintiffs in connection with the Rule 23 motion for class certification.

Counsel for the defendants has made a number of points and a number of important points that I'd like to address.

The Milberg Weiss firm has been indicted, Your Honor. And we take these charges very seriously.

Mr. Schulman who was on the original papers has resigned from the firm. Prior to that he took a leave of absence. Mr. Bershad likewise has taken a leave of absence.

The counsel who have been litigating this case on a day-by-day basis in the current time frame after Mr. Schulman took his leave of absence are not implicated in

the indictment. Indeed, the U.S. Attorney presumably recognizing a presumption of innocence that applies to these cases stated in the transcript that is before Your Honor that you would hope that other persons at the firm would step forward to litigate. And that's exactly what has happened.

The trial in the Milberg Weiss case is presently scheduled for January of 2008. There is some motion practice that is scheduled or may be scheduled to take place before that aimed at the allegations but the trial itself is now set for January 2008.

And that is important, Your Honor, because under the schedule that Your Honor has established, discovery in this case, in the Organogenesis case, is set to conclude in April of 2007. And assuming that that schedule is met, even assuming some modest amendment to that schedule, it is highly likely that summary judgment proceedings or even a trial in this action will conclude prior to the scheduled trial in the Milberg Weiss case now set for January 2008.

Indeed, at one of the pretrial hearings Your Honor had set April of 2007 as the date for filing of summary judgment motions. And, therefore, the prospect that Milberg

Weiss will be unable to prosecute this case because of the case against it is highly remote.

I believe, Your Honor, that the record shows -- and

I want to deal with what he calls "false certifications" in a moment. But I would submit, Your Honor, that the record shows that the firm has prosecuted this case effectively and successfully from the time of the case through today, the day that brings us here today.

We survived a very aggressive and rigorous motion to dismiss, that Your Honor had dismissed some defendants but for the principal part the complaint is intact.

We have been engaged in document discovery. Our proposed class representatives Mr. Madigan and Mr. Hoffman have been deposed.

And incidentally, Your Honor, Mr. Hoffman and Mr. Madigan are in the court today. And they're sitting behind the bar. And certainly if the Court has any questions, they're available.

So I think the record in this case is quite good in terms of how the firm, consistent with its reputation in the past, has prosecuted this case.

Counsel points out that Mr. Madigan filed what counsel called false certifications. We take that very seriously. Mr. Madigan did file a certification at the beginning of the case that for the most part had problems because he did not include the sale transactions. And, indeed, as we pointed out in our papers, the word "sale" was crossed out so there was a misunderstanding.

In the second certification he corrected for the most part those problems but based upon the work of an expert Mr. Marek, who himself has put in a report, there were a couple -- there were some transactions of Mr. Richard Madigan's son who is also named Richard but I think it's Richard, Jr. who has the same street name and that was in error. And these errors do happen. There is no suggestion that the current extant list of transactions is accurate.

As for Mr. Hoffman, there is no suggestion that anything about his certification is wrong, improper or otherwise misleading in any way.

With respect to Mr. Madigan, Your Honor, there is a dispute as to whether his transactions show damages or loss under applicable law. And the dispute here, Your Honor, is very similar to the dispute that Your Honor heard in another case before this court where my firm was involved. It's called the CVS case. And it's a dispute between FIFO, F-I-F-O, and LIFO, L-I-F-O. And these are different ways of an accounting for transactions. First in first out or last in first out.

And it goes to the issue of whether the sale that you match is matched to the most recent purchase or some other purchase. We have briefed the issue and have showed the Court I submit that LIFO is plainly an adequate and appropriate manner of calculating damages. And Your Honor

accepted that in the CVS case. And the IRS uses that and numerous courts have also used that.

Perhaps the jury at some juncture down the road or perhaps in some motion in limine or summary judgment proceeding the Court will have an opportunity to address that issue, or the jury will. But at this stage there is no question that Mr. Madigan has standing. Indeed, Mr. Marek showed that his losses are about a hundred thousand dollars.

So we have a good faith basis to show that Mr. Madigan has been damaged and that he has losses that are substantial and clearly has standing.

They also, defendants also make the argument that Mr. Hoffman had a financial advisor and that it was a discretionary account with Mr. Hoffman's financial advisor making decisions to purchase the stock in Organogenesis. But that is a rather typical type of arrangement.

These class representatives are businessmen. They're not lawyers. They're not professionals in the stock market. And it's rather typical and no doubt many members of the class have financial advisors upon whom they rely.

What the defendants would have to show, Your Honor, and which they haven't shown, is that there is something about the purchases in this case such as the receipt of inside information of a material nature that renders nugatory the statements that we say and the omissions that

we say inflated the market price of Organogenesis stock during the class.

For example, in their papers the defendants say

that one of the plaintiffs, either directly or through his financial advisor, was told about a crossover, that the company at some point would become profitable. Yet that is very similar to what we are complaining about in this lawsuit.

The defendants stated that at some point in time in the future the company would become profitable. We challenged that statement.

What they didn't disclose, Your Honor, is that each time they sold the product at issue -- and it's a skin therapy product -- the company was losing money.

What the defendants did not disclose, Judge Tauro, is that the financial condition of the company was quite weak. They told us that they have some financial arrangements with Novartis, a marketing partner, but did not disclose the difficulties that the company would have in exercising those financial options called the put option.

So they didn't disclose the truth about what was happening. And, therefore, whether Mr. Hoffman had a financial advisor who was duped or whether Mr. Hoffman individually would have made the purchase decision, the fact of the matter is that what was being told to Mr. Hoffman's

advisor is quite similar to what the market was being told.

They also challenged Mr. Hoffman because they say that he purchased towards the beginning part of the class period rather than at the end. And any time, Your Honor, there is a class period that spans several years, as it does here, invariably we are going to have situations where

people who bought towards the beginning did not buy at a time when each of the offending statements was made.

But what the law teaches us, and one of the leading cases is Blackie v. Barrett, is that when there is a course of conduct where the defendants like they're alleged to have done here make misrepresentations and omissions about the financial condition of the company and about the marketing and manufacturing problems, we don't have to have a plaintiff who purchased on each day during the class period.

If that were the law, we would wipe out class certification. That would be the end of Rule 23.

I wanted to briefly address their statements about, the defendants say it was about the defendants -- the defendants say it was that the plaintiffs don't know enough about this case or cares enough about the indictment.

They're not lawyers. They have put in declarations stating that they have confidence in Milberg Weiss. There is a presumption of innocence that we urge this Court to apply because, Your Honor, what I'm concerned about is

notwithstanding the U.S. Attorney's statement that individuals at the firm should step up to the plate and litigate these cases, I am concerned that the rule that the defendants urge upon this Court is in effect a rule that says if the firm has been challenged by the U.S. Attorney, even if there is probable cause, if it's not proven, it doesn't matter, Milberg Weiss, you must close down.

And I don't believe that that is the law that applies here. Counsel --

THE COURT: In this type of case.

MR. WALLNER: Pardon me?

THE COURT: In this type of case. I think that, that is what I gather. Not that anybody is ready to turn their back on the presumption of innocence, the fact that you have to prove a case beyond a reasonable doubt.

I think what he was suggesting to me -- and he can speak for himself in a moment -- is that in this type of case where a few people are given so much trust and authority to litigate the financial problems of hundreds of others, that there is a heightened standard that we should look at when a situation, an unfortunate situation like has this happened, a law firm being indicted.

MR. WALLNER: Your Honor, even accepting --

THE COURT: Not to demean the personal injury part; but, I mean, it isn't an intersection case where one

of your skilled lawyers, and some of them were very, very skilled, and tried those cases, of course, is going to try a case. Here you have much more at stake. And I don't mean to sound pedantic.

MR. WALLNER: I appreciate that.

THE COURT: I am telling you what you know anyway.

MR. WALLNER: Sure.

The fact of the matter is, Your Honor, that while I can appreciate the distinction between the so-called personal injury case and the case here, I think this Court should be guided by what many other courts have done. Not

every court to be sure, which is to say there is a presumption of innocence.

Milberg Weiss has been able to litigate the case. We overcame the motion to dismiss. And the trial in the Milberg Weiss case is set for next year at a time when this case, assuming Your Honor's schedule sticks, even with some modifications, may well be over.

I think, Your Honor, that the issue of class certification in terms of who the representatives are, who the counsel is, how they're performing, can be assessed throughout the course of the litigation.

THE COURT: Who is going to be the class representative? Who is going to be the class plaintiffs?

MR. WALLNER: Mr. Madigan and Mr. Hoffman.

THE COURT: Just two?

MR. WALLNER: Yes. The representatives. And that's not unusual. In many cases there is one proposed class representative and in others there are multiple.

So we have what I believe to be highly adequate class representatives. They don't challenge anything about Mr. Hoffman's certification. And we have a case which likely can be concluded at least through trial prior to the time of the Milberg Weiss case.

If moving down the road the Court is concerned --

THE COURT: Now, the defendants are asking to have -- who are you asking to have deposed? Forgive me for --

MR. SHAPIRO: Your Honor, we have pending

motions to depose Mr. Conen, Dr. Conen who is one of the plaintiffs, and Mr. Bowie.

And I would say the bigger point here, the problem with the wait and see approach is what happens, even if standing were a jury question, what happens if he doesn't have standing? What happens to the rest of case post judgment? What if after a January trial Milberg Weiss pleads guilty or gets convicted?

I mean, we have a pretrial before Your Honor in April. We've been making time and we're ten weeks out and

they still don't have a good plaintiff and they have a law firm that's representing them that no court has appointed to a fiduciary duty -- a fiduciary role as sole counsel.

THE COURT: Okay. I am going to give you an opportunity to speak in a minute. I just wanted an answer to my question.

Go ahead.

MR. WALLNER: Yes. They are seeking to take depositions of people who are not proposed class representatives.

Mr. Hoffman's certification they don't challenge. He is highly adequate. We believe Mr. Madigan is highly adequate too.

What Mr. Shapiro's statement to Your Honor focuses on is the prospect that at the Milberg Weiss trial in January 2008, well after this case may be over, something will happen that will affect this case. But this case will be over.

If, for example, Your Honor, we go to trial in the summer and we win and we win all the damages and then next year in 2008 there is a trial against Milberg Weiss which turns out hypothetically adversely to Milberg Weiss, that judgment is still sacrosanct. We will have recovered on behalf of the class.

Let's flip it. Let's suppose we go to trial, Your

Honor, and we lose the trial. Or let's suppose there is a summary judgment motion made by the defendants and they get summary judgment in their favor. Then the case is over.

So the prospect that something horrific could happen to Milberg Weiss next year I submit should not inform the Court about the propriety of moving forward at this time, particularly where I submit my firm has prosecuted this case effectively to the ultimate benefit of the class members. We have sustained --

THE COURT: What about the assertions that your law firm hasn't complied with the discovery orders? I don't have it at my fingertips, but substantial discovery is alleged not to have been timely produced, produced in a timely fashion.

MR. WALLNER: Your Honor, I would ask Mister --

THE COURT: Going right up through today as I take it.

MR. WALLNER: Mr. Sloane in the context of the discovery motions is certainly prepared to discuss that. But I don't think that the challenge --

THE COURT: That is all part of the qualifications of the firm to go forward. I mean, if you have got a close case, if you have got a close case, you know, given the indictment and the presumptions and all

that, and my sensitivity to it. I mean, I have had your firm before me many times over the years. Always very satisfactory. Never anything but a good experience.

But a different ball game today. And if on top of that load that you have to carry, because it is your burden to reach the top, we have, for whatever reason, the failure to do the routine discovery things that have to go on in every case. Maybe it is overload because of the circumstances. I could understand if it were.

But if it exists, maybe they should not be in the case.

MR. SLOANE: Your Honor, may I respond to that particular point?

THE COURT: You will have -- I want to give him an opportunity to finish.

MR. WALLNER: Yes.

THE COURT: You can have all the time you want.

MR. WALLNER: Yes. Mr. Sloane is familiar with the discovery issue. And may I defer to my partner Mr. Sloane?

THE COURT: Do you want to stop -- you don't have to answer my question now. If you want to go on with the rest of your argument --

MR. WALLNER: Yes, sure.

THE COURT: If you want to pause, you may pause.

MR. WALLNER: May I pause? Mr. Sloane will address that. Thank you.

MR. SLOANE: I just wanted to point out, Your Honor, that the plaintiffs have complied with all of their discovery obligations in this case. And I am not aware of any motion that the defendants have made that we haven't complied with that or that there is any discovery outstanding --

THE COURT: There is no motion to compel.

MR. SLOANE: We haven't -- or that there is any suggestion that there is discovery that they are entitled to that we have not provided.

THE COURT: Well, let's get an answer to that.

MR. SHAPIRO: Actually, Your Honor, there is very much a suggestion.

On June 30th they were supposed to give us trading records. Rule 11 required them to have those trading records in January '04. They sent a letter saying they were just collecting them.

We sent about $100,000 or more going to collect their trading records from third parties and then having to hire someone to figure all this out.

And that is not effective and successful

prosecution of this case.

MR. SLOANE: Excuse me, Your Honor.

The plaintiffs, all of the plaintiffs produced the documents that were in their possession, including documents relating to their trading in the stock by January -- June 30th, excuse me.

There were records that were records regarding their trading that were not in their possession and that we sought from their brokers. And defendants also subpoenaed their brokers. We also subpoenaed some of their brokers. And those documents were provided after June 30th but that was because they were provided by the brokers, not because we did not live up to our obligations under the discovery order.

And I would like to point out that defendants, the defendants did not produce eight boxes of documents that they should have produced under the discovery order till months after June 30th. So the suggestion that we have not been complying with our discovery obligation is not a fair one, Your Honor.

MR. SHAPIRO: Judge, it absolutely --

THE COURT: I am going to give you a chance to respond.

MR. SHAPIRO: Fair enough.

THE COURT: Go ahead.

MR. WALLNER: I just wanted to conclude --

thank you, Your Honor. Robert Wallner. I just wanted to conclude with the attack on the due diligence and care of the plaintiffs. They are laymen. They are not lawyers.

In cases like this it is --

THE COURT: But the law has changed. They are supposed to have more than a passive interest. I mean, there is a burden to get yourself involved. I thought that was the spirit of this action.

MR. WALLNER: They have been involved, Your Honor, understanding that they are laymen. They are not lawyers. And they have produced discovery --

THE COURT: Well, presumably they are very successful businessmen who know how to read and know better than to get snookered by anybody. And so if there is going to be a presumption, I will give them that presumption.

Those are the two gentlemen seated in the back?

MR. WALLNER: Behind the bar (indicating), yes.

THE COURT: They even look smart just sitting there.

(Laughter.)

UNIDENTIFIED SPEAKER: I am smart.

(Laughter.)

MR. WALLNER: And they have taken this case

very seriously. They confer with plaintiffs' counsel. They sat for depositions. They answered lots of questions.

Mr. Hoffman came up today from the New York area. Mr. Madigan is more local. And they are prepared to

continue to prosecute effectively in this case.

The issue I submit, Your Honor, at the end of the day is where you have a case where there has been massive fraud alleged against the company and its individuals where the action has been sustained on a motion to dismiss and where the shareholders have sustained substantial financial losses. This company as we know went into bankruptcy. Whether there is any remedy left for the class --

THE COURT: But you keep tapping on the motion to dismiss. That is not a victory, denial of a motion to dismiss. I have to look at what is alleged and take it to be true.

MR. WALLNER: That's correct.

THE COURT: As long as somebody can articulate some language that passes minimum muster, then you survive the motion to dismiss.

A motion for summary judgment is a different ball game.

MR. WALLNER: That's correct. That's correct.

But I submit, Your Honor, that they have a sufficient understanding of the case. They conferred with

counsel. And Mr. Madigan did make some mistakes. There is no suggestion that Mr. Hoffman made any mistakes.

And in the absence of a Rule 23 certification, from a practical perspective the ability of class members to vindicate their rights in this case will be eliminated.

And we request that Your Honor grant the Rule 23 motion. Thank you.

THE COURT: Okay. Do you want to be heard again? Go ahead.

MR. SHAPIRO: Judge Tauro, the answer to every mistake that's made on the plaintiffs' side can't be that an investor has lost money.

The rule requires them to show each and every prong, not to say it is not proper, not plead, but something substantial. More than a mere showing.

At every turn this has been the response to a misstatement. An investor has lost money. The defendants are liars and we'll fix it all later on. That's not how it works.

They started this case accusing others of fraud with false affidavits, still one on file. They can't now just say, well, they're laymen.

Well, Mr. Bowie wasn't a layman. He was a stock broker who got it 95 percent wrong. Oh, by the way, he was Mr. Madigan's stock broker.

It's not enough to say that they're here in the court today and showed up for a deposition. They never spoke according to Mr. Madigan before his deposition. And they only spoke for ten minutes once on a call according to Mr. Hoffman. This may be the first time they ever laid eyes on each other.

They are not controlling the lawyers. Your point, Your Honor.

The whole idea was that the statute is going to come up with some sort of protections to put the litigants

in charge of the lawsuit like it is in other cases.

Here no one is minding what the lawyers are doing. Mr. Hoffman who is inadequate because he says it's all counsel's job, not my problem.

Mr. Madigan said he didn't read the complaint. That's not minimal knowledge of what's going on in the case.

Now, with respect to the presumption of the innocence, and we will see where all this goes, it's exactly right. It is a higher standard. The question isn't whether this law firm will some day be convicted. We only have the facts that are in front of us now.

We have the benefit of hindsight. We never have foresight. There is a trial that's scheduled, a criminal trial I gather, for ten, twelve, eleven months from today. It's very serious. The allegations of that, people in

courts were lied to. One hundred fifty class action lawsuits. Legal fees in excess of, I don't know, a hundred million dollars.

Two clients have pled guilty accounting for more than, you know, seventy of these cases. I don't know why they pled guilty. But this is serious.

There is not a single case that has been brought to the fore where this law firm has been affirmatively appointed by any court as sole counsel in any case under Rule 23. And the standard is higher. It's not whether you have been convicted.

Surely whatever Rule 23(g) means and whatever Rule 23(a)(4) means, it doesn't mean that anybody is

qualified if they haven't yet, you know, been convicted, sentenced and, you know, and filed and had denied their posttrial motions.

With respect to the standing, it's sort of the same issue. Oh, Mr. Madigan, we'll figure out FIFO or LIFO later on.

Well, first, with great respect, they are just wrong that LIFO is not like an appropriate methodology. There have been five cases within the last two or three years, most of which post Dura which say LIFO is what you do and FIFO is, you know, what the IRS does under different circumstances.

Nothing like as I read your CVS opinion. Your Honor knows what you meant in CVS. I am not going to --

THE COURT: I didn't really decide the issue.

MR. SHAPIRO: I don't think you -- well, whatever you said in CVS, I could not read that to say that you now say it's open season for lead plaintiffs who don't read complaints, repeatedly file false affidavits and don't know each other. And it didn't seem to displace anything about standing. And it came before Dura.

When I read the transcript that Your Honor did in CVS, you seemed to focus on the common liability and the allegation of the inflated stock.

The Dura decision they don't deal with in their papers.

The Dura decision 2005 says that common themes and liability and inflated stock alone isn't enough. To be a

plaintiff, you have to plead and later on you have got to prove that you bought the stock at the inflated price because of the statement and then you lost money. You've got to tie it all up. It's kind of like Prosser, you know, proximate cause.

So to say it's all going to be worked out later isn't acceptable. And with respect to the different scenarios that Milberg Weiss will win millions of dollars and it will all be great or Milberg Weiss will lose and it

will all be great, well, what if we win and we get a judgment in our favor and then it's collaterally attacked. That's not trivial. That's what Judge Hornby was focused on in part when he didn't want to, even as one handful of counsel in the Maine case motor vehicles. Medtronics said that. I believe that the Key v. Gillette case from years back from the First Circuit said that. There are other cases as well.

We have an interest in finality also. You can't even settle a case under these circumstances, Andrews and so forth, I mean, you can't buy the peace.

And I think that's why Milberg Weiss, including in the cases it cites to you, it's telling courts, told Judge O'Toole in one of our cases, no worries, we've got co-counsel. They're all alone here.

Finally, Your Honor, we rest on our papers with respect to this inside trading issue. We very clearly put in an evidentiary record to show that this broker that Mr. Hoffman relied on is precisely the problem. He breaks

the chain. He's at least subject to atypical, you know, defense as an atypical plaintiff.

That broker by the way has the distinction of being subject to cease and desist fraud orders from both the SEC and the Federal Reserve for not being truthful to clients. That same broker was making written promises that contrast

starkly with the public statements. We've briefed that including why this case is not like Swack.

And I guess I would just close by saying they have to prove every one of these elements. They haven't done it. Saying that somebody who is absent and not here is going to lose out is not the answer. That's the reason why they should have gotten it right back in 2004 when the PSLRA and your very early Greebel decision under it said they needed to get it right and file something honest at the outset.

THE COURT: Okay. Anybody else scheduled to speak or not scheduled?

MR. WALLNER: Your Honor, I just wanted to spend thirty seconds responding to Mr. Shapiro's point --

THE COURT: Go ahead.

MR. WALLNER: -- about the Swack case. The Swack case which is a decision in the District of Massachusetts that we cite in our papers, the Transkaryotic decision also of this court, support the proposition that even if a financial advisor or a purchaser has access to information outside the public documents, unless that information is so different and is going to become the focus of a trial, it doesn't matter.

In the real world it's not surprising that investors would have sources of information. They speak to their friend. They speak to their broker. Maybe the broker

knows someone inside the company. They also have prices. They have documents that are publicly filed.

It may be a whole confluence of issues. But as long as the price of the stock is affected by what is happening in the marketplace, and they haven't been able to break that chain, then it matters not that the broker may have spoken to some people inside the company.

Thank you.

MS. SHANAHAN: Your Honor, may I address my summary judgment motion briefly?

THE COURT: Go ahead.

MS. SHANAHAN: We largely rest on the papers; but as the Court is aware, the chronology goes that Mr. Hoffman purchased his last set of Organogenesis stock on April 13, 2000. Mr. Arcari did not join the company until May 1st, 2000. And in the complaint the court sustained the motion to dismiss does not describe any statements by Mr. Arcari during the time frame in which Mr. Hoffman was purchasing his stock.

And it's for that very reason that we submit that under both the Constitution, Article III, and rulings of the First Circuit and other courts, there is no standing for Mr. Hoffman to sue Mr. Arcari because there is no connection between any statements in the market at the time that Mr. Hoffman purchased and anything done by Mr. Arcari.

Now, there is a suggestion in the plaintiffs' response, which is a Rule 56(f) response, that this is an issue that should be decided at a later date, perhaps on the eve of trial after there is discovery. And I would submit to the Court that that is incorrect really for three reasons.

First, this motion does need to be decided now and really in advance of certification motions. The law of the circuit is clear that standing is a threshold issue. It has to be decided before certification. And lead plaintiff cannot bootstrap himself into class representative position based on the class standing. He has to have standing in his own right.

Secondly, as the Court pointed out, this case had a motion to dismiss sustained based on certain described statements allegedly made by the defendants.

Now, in their papers in opposition to summary judgment plaintiffs seek to do additional discovery of Mr. Arcari and of all the other defendants and numerous third parties.

And I would submit that any discovery they do in that case is essentially a fishing expedition in order to find evidence that may or may not be a claim about what Mr. Arcari had done very abstractly with the company before he joined.

But the papers that we submitted in support of the motion demonstrate that Mr. Arcari joined the company May 1st, was not involved with the company before April 13th and so that is not a warranted fishing expedition.

More importantly, as a matter of law, anything that they seek to describe as potential evidence that they will find doesn't rise above the level of what has been described as aiding and abetting evidence.

And the Supreme Court decision in Central Bank has held quite clearly that there is no liability for aiding and abetting a 10(b) violation. There has to be an actual statement made by the defendant that is the crux of his liability.

Mr. Arcari didn't say or do anything at Organogenesis prior to Mr. Hoffman's final purchase of stock; and, therefore, the summary judgment motion is not an academic exercise. It does need to be decided in advance of the certification motion.

And it's particularly important in this case given what Mr. Shapiro laid out in great detail with the problems of Mr. Madigan's both standing and adequacy to prosecute this case.

In the event that Mr. Hoffman remains as the sole lead plaintiff, he cannot be a sole lead plaintiff in a class with Mr. Arcari as the defendant.

THE COURT: Do you want to be heard?

MR. SLOANE: Thank you, Your Honor.

The defense counsel said that the defendant Arcari

didn't say or do anything before he joined the company on May 1st.

Now, it is important to understand that he formally became employed with the company on May 1st and we understand it as the chief financial officer but we don't know what the defendant Arcari did before then.

The time period that we are talking about --

THE COURT: Does that help you that you don't know? I mean, don't you have to know? You are bringing the case.

MR. SLOANE: Well, Your Honor, we've alleged a common course of conduct among the defendants to participate in --

THE COURT: Do you have some good faith basis for making that as an assertion?

MR. SLOANE: Yes, Your Honor. We have a document that we have -- that we obtained that was, we allege was created by the defendant Arcari, and that he has not denied, that lists a number of actions by one of the other defendants, defendant Albert Erani which would be described charitably as suspicious activity. And that activity goes back to March of 2000 which is the month

before Mr. Hoffman made his last purchase of stock and two months before --

THE COURT: What does that have to do with Arcari?

MR. SLOANE: It was the defendant Arcari who created this document. He wrote it.

THE COURT: What do you say about that?

MS. SHANAHAN: Your Honor, the document that they're referencing has a date of October 2001 on it. It's a long list of chronology issues.

The two that Mr. Sloane is identifying that -- again, it's dated March 2000 -- relate to essentially publicly available information. It doesn't indicate any insider information or activity by Mr. Arcari in the March 2000 time frame. This is a document dated October 2001.

More importantly, the vast picture that the plaintiffs can paint with these inference that there might have been some, I don't know, meeting or whatnot that Mr. Arcari attended at the company, which I don't believe there is any basis for alleging, they have to allege that Mr. Arcari made a statement, a public statement giving rise to liability under securities laws.

There is no statement here. And given that there is nothing in the complaint and there is nothing identified that they say, oh, well, by the way, there is this other

statement that was out there made by Mr. Arcari, he simply cannot be a defendant.

The courts have recently held in the Eighth Circuit in the In Re: Turner Communications case and in other cases that it's not enough for a third party to be sort of around the periphery while the main defendants were making statements. They have to have actually made statements themselves in order to be liable under 10(b).

So even if this phantom evidence that I don't

believe there is any basis for expecting it would be found, even if such phantom evidence were found, it's just at best aiding and abetting evidence.

And under the Central Bank decision out of the Supreme Court, there is no liability for aiders and abettors. That's not a pendent claim.

THE COURT: All right.

MR. SLOANE: May I briefly respond, Your Honor?

THE COURT: Please.

MR. SLOANE: I'll first address the law and then briefly address the facts.

With respect to the law, we're not trying to state a claim for aiding and abetting liability.

There is primary -- excuse me -- primary liability can be found, and I'm quoting now from the Swack case, I

mean, some cases found where a person substantially participates in a manipulative or deceptive scheme even if a material misstatement by another person creates the nexus between the scheme and the securities market.

So we don't believe that it is necessary for the defendant, for defendant Arcari to have made a public statement in order to be held liable.

There are also other cases to that effect, Your Honor, which we cite in our brief, including the Fezzani case.

With respect to the facts that give rise to the inference that he was involved in this scheme before he

joined the company, the document that I was referring to is dated October of 2001. But we don't know when Mr. Arcari possessed this knowledge or first came to possess this knowledge about the company. We don't know what it says about when he first came to be involved in this scheme or this conspiracy.

Defense counsel says that this document says nothing other than what was already publicly disclosed.

I'd like to read to Your Honor the two entries, they're very brief, from March of 2000. And I submit that these are not in any public filing.

This is an entry speaking about Albert Erani. It says, "Drove board to approve 6.2 million dollar cash

redemption in Series C convertible preferred stock at a time when the company had little cash. Could have redeemed for stock but was dilution phobic."

The other entry says, "Did not sell stock off the shelf when opportunity existed to sell more shares at $14.50 per share."

The other issues in this document, Your Honor --

THE COURT: What is the significance of that, in terms of anything other than to say it is historic treatment of something that happened?

MR. SLOANE: Well, we don't know, Your Honor, when -- this document doesn't say when, No. one, defendant --

THE COURT: Well, it didn't say that Mr. Arcari did anything. It is just a summary of some

information. We don't know where he got it.

MR. SLOANE: That's right, Your Honor. But I submit that we should have the opportunity to find out what he does know about it, when he became involved, if he was involved in any of this suspicious activity that's listed here, including the manipulation or the attempted manipulation of the market for the company's stock, and when he became involved, if at all, in this scheme.

THE COURT: Well, to make it clear, then what you are saying to me is that piece of paper which, for want

of a -- I don't know how we can identify it except to take it and call it a court exhibit.

MR. SLOANE: Your Honor, if I may, this has been submitted to the Court on a previous motion.

THE COURT: Well, I am sure it has. I want to make sure that we are talking about the same piece of paper. We will call it Court Exhibit 1 for the purposes of this hearing. Okay. So we are literally on the same page.

Now, are you telling me that is all you have got? If that isn't it, there is nothing else? With respect to Acari.

MR. SLOANE: Well, what we're saying is that on the basis --

THE COURT: That is a simple question. And I don't want to press you but --

MR. SLOANE: At this point, yes, Your Honor.

THE COURT: That is a good, honest answer. But this is the ball game for you at this point.

MR. SLOANE: Yes, Your Honor.
THE COURT: Okay.
MR. SLOANE: Before the conclusion of discovery, yes.
THE COURT: Okay. Anything else? Anything from anybody?
MR. SHAPIRO: Judge, I'm just reminded, if I

could just drop these (indicating) off with Ms. Lovett. We have, for our chart we have our citations for everything that's sort of on the box, that's in the boxes for the time line. If I can just leave this off?
THE COURT: Okay. You can give those to her. Thank you.
MR. SHAPIRO: Thank you, Judge.
THE COURT: Thank you very much. Very well presented by everybody. You can't all win unless you are smart and you go outside and settle the case. That would be smart.
But short of that, then I just thank you very much for helping me and I will do the best I can with it. All right.
COUNSEL: Thank you, Your Honor.
MR. SLOANE: Your Honor, would you like me to submit this (indicating)?
THE CLERK: Yes.
THE COURT: Yes. Just so we can have it. I don't want everybody wondering what piece of paper we were talking about.

(Court Exhibit No. 1 received in evidence.)

(Court Exhibit No. 2 received in evidence.)

(WHEREUPON, the proceedings were recessed at 12:20 p.m.)

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

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